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No. 745

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HAROLD B. WHALEY,

In the  
**Supreme Court of the United States**  
OCTOBER TERM, 1955

**RAYONIER INCORPORATED, a corporation, Petitioner,**  
vs.

**UNITED STATES OF AMERICA, Respondent.**

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

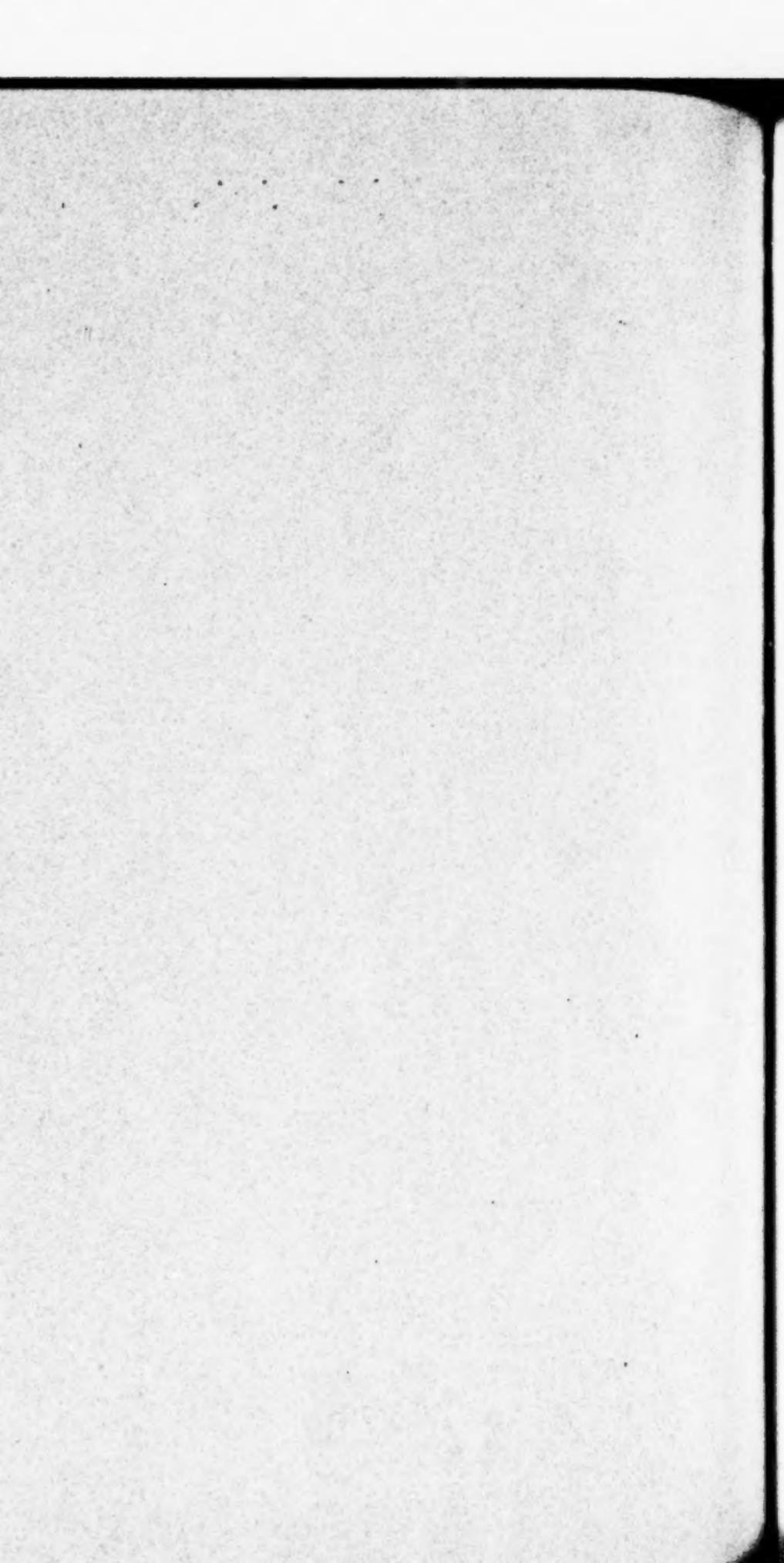
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Petitioner prays that writ of certiorari issue to review the Court of Appeals' judgment entered September 1, 1955.

**CITATIONS TO OPINIONS BELOW**

The District Court for the Western District of Washington did not write an opinion and its decision is unreported (R. 43, 62).<sup>1</sup> The Court of Appeals' opinion (R. 80-89), Appendix D, *infra*, pp. 53-65, is reported in 225 F.2d 642.

**JURISDICTION**

The Court of Appeals' judgment was entered September 1, 1955 (R. 90; Appendix E hereto, *infra*, p. 67). Petition for Rehearing, filed September 30, 1955, was denied October 14, 1955 (R. 91). A Second Petition

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<sup>1</sup> Portions of the District Court's remarks, selected by stipulation of counsel, appear in "Transcript of Record" (R. 33-36). Nine other copies of said Transcript are filed herein. All of the District Court's oral remarks, separated from colloquy, are printed in Appendix C, *infra*, pp. 41-52.

for Rehearing was filed December 27, 1955, pursuant to leave granted (R. 93) and was denied February 17, 1956 (R. 95). On January 10, 1956, Mr. Justice Douglas extended to March 12, 1956, the time for filing this Petition.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

### **QUESTIONS PRESENTED**

1. Is the United States liable under the Tort Claims Act for negligence of its employees fighting fire on cut-over lands adjacent to forested lands, or is it immune from such liability because of the "public fireman" doctrine stated in *Dalehite v. United States*?<sup>2</sup> and to

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<sup>2</sup> *Dalehite v. United States*, 346 U.S. 15 at 43-44 (1953).

"As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

"\* \* \* the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' *Feres v. United States*, 340 U.S. 135, 142, 95 L.Ed. 152, 158, 71 S.Ct. 153.

"It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§1346 and 2674.

"The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. §2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres*. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz v. Beacon*, 295 N.Y.

what extent has the *Dalehite* statement been limited by *Indian Towing Company, Inc., v. United States?*<sup>3</sup>

2. Is the United States liable under the Tort Claims Act under circumstances where a private person would be liable to claimant in accordance with the law of the State of Washington:

(a) Because of negligent failure to conform to standards set by Washington statutes relating to fire prevention and fire suppression on lands in forest areas;

(b) Under common law as a landowner, as a volunteer and as a contractor with a third party for negligently failing to prevent and extinguish fire in forest areas?

3. Do Washington Statutes RCW §§76.04.370 and 76.04.450, Appendix B, *infra*, pp. 35-38, impose liability without fault and are they pertinent in determining Government negligence and liability for failing to conform thereto? The Court of Appeals decided the statutes do impose liability without fault and are not applicable to the Government, in conflict with the decision of the Fourth Circuit Court of Appeals in *United*

51, 64 N.E.2d 704, 163 A.L.R. 342 (1945). To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

<sup>3</sup> *Indian Towing Company, Inc., v. U. S.*, 350 U.S. 61 (1955) holds that: (a) Municipal immunities do not apply to immunize the Government; (b) the Government may be liable for its negligence in performing even public or "uniquely governmental" functions; (c) government liability is not predicated on the presence or absence of *identical* private activity or on whether a private party is likely to be performing such activity; (d) when Government undertakes services, inducing reliance, it will be liable if it fails to perform prudently as a volunteer; and (e) the Government should not be immunized from liability by technical, legalistic obscurities premised on fortuitous circumstances.

*States v. Praylou*, 208 F.2d 291 (4th Cir., 1953), certiorari denied 347 U.S. 934 (1954).

4. Can the United States be liable for its negligence as a volunteer? The Court of Appeals decided not, in conflict with this Court's decision in *Indian Towing Company, Inc., v. United States*, 350 U.S. 61 (1955), and with the Fifth Circuit Court of Appeals' decision in *United States v. Lawter*, 219 F.2d 559 (5th Cir., 1955).

5. Has the Court of Appeals so construed the Amended Complaint as to do substantial justice, or has it so grossly misconstrued the Amended Complaint as to call for an exercise of this Court's power of supervision? Two important matters are involved: (a) An allegation that "defendant owned, had control of and free and unrestricted access to" lands, including the right-of-way thereon, was stated by the Court to mean that the defendant had only "a right to enter and inspect the right-of-way." (b) A fire which started August 6 burned continuously until after September 20. By August 11 it was contained and controlled in smoldering form within a 1600-acre area. The Court of Appeals said, "It was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury." Vital questions as to relationships and duties of the parties and of proximate cause hinge on the proper and fair construction of the complaint. A corollary question is whether negligence of Forest Service employees as a proximate cause of a fire is nullified as a proximate cause solely by the same employees donning firemen's hats and thereafter proceeding negligently in the immune status of "public firemen."

6. Depending upon the extent by which the "public fireman" doctrine pronounced in *Dalehite* has been limited by *Indian Towing*, primary or collateral questions include: (a) Is the "public fireman" pronouncement of *Dalehite obiter dictum*? (b) Is the "public fireman" immunity contrary to the Tort Claims Act? (c) If there is "public fireman" immunity, do not equally well-established exceptions to that immunity apply? (d) Does the "public fireman" doctrine immunize the Government in all fire fighting situations, and if not, is this not a case where the doctrine should not apply?

### **STATUTES INVOLVED**

The case does not involve any constitutional provisions, treaties, ordinances or regulations.

All of the federal statutes involved are set forth verbatim in Appendix A, *infra*, pp. 19-23; all of the Washington statutes are set forth verbatim in Appendix B, *infra*, pp. 25-39.

The Federal Tort Claims Act, 28 U.S.C. §1346(b), gives district courts:

" \* \* \* exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, \* \* \* caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Section 2674 makes the United States liable " \* \* \* in the same manner and to the same extent as a private individual under like circumstances, \* \* \* "

**STATEMENT**

Suit under the Tort Claims Act for damages occurring on and after September 20, 1951, from fire which started August 6 and burned continuously thereafter. Government's motion to dismiss the Amended Complaint for failure to state a claim on which relief can be granted was granted by District Court and affirmed by Court of Appeals.

The District Court's jurisdiction was conferred by 28 U.S.C. §1346(b) and §§2671 to 2680, Appendix A, *infra*, pp. 19-22, the negligent acts and omissions complained of having occurred and the damage having been sustained within the Western District of Washington, Northern Division.

On the Olympic Peninsula in Washington the Government owns timberlands, some of which are cutover, administered by the U. S. Forest Service for timber sales to private industry. Privately-owned timber is adjacent to and intermingled with Government lands (R. 4-6). Where the fire started, the railroad of Port Angeles Western Railroad (P.A.W.) crosses Government lands. The Government "owned, had control of and free and unrestricted access to" the right-of-way and adjoining lands (R. 11). The right-of-way was *not* one granted by the United States. The right-of-way and adjoining Government land contained much inflammable debris, etc., contrary to the Washington statutes, Appendix B, *infra*, pp. 25-39 (R. 6-9). Commonly, and for years prior to August 6, 1951, P.A.W. operated defective and fire hazardous railroad equipment which threw sparks, and no patrol speeder followed the trains, all contrary to Washington statutes.

Forest Service employees knew all of the foregoing, had the right and power to abate the fire hazardous conditions and practices on its lands, but did nothing about them (R. 11-13). On August 6, 1951, six spot fires caused by sparks from a passing train occurred on and in the vicinity of the right-of-way. Forest Service employees immediately assumed, took and exercised exclusive supervision, direction and control of the fighting and suppression of all fires here involved. Petitioner relied upon Forest Service employees to do so (R. 13-14). The fire was contained in 60 acres but later spread to 1600 acres of cutover land where it was contained and controlled by August 11 (R. 14-15). Extremely dry weather prevailed for months prior to August 6 and until after September 20. Dry winds and low humidity were forecast and occurred at all pertinent times. Valuable stands of green timber adjacent to the 1600-acre area were imperiled (R. 10, 18-21). The Forest Service maintained only a patrol of the area with but few men. It took no steps to seek out and extinguish the smoldering fire. Sufficient men, equipment, water, tools, supplies and roads to extinguish the fire were available and could and should have been employed in the exercise of due care at all stages of the fire, including the spot fire stage, the 60-acre stage and the 1600-acre stage. All the foregoing was known to the Forest Service employees but they negligently failed to use or employ the same (R. 16-22). Stumps and logging debris in the 1600-acre area, privately owned, burned in smoldering form from August 11 to September 20, when foreseeable and forecast winds blew sparks out of the area into adjacent standing timber, causing a

tremendous forest fire and the damage complained of (R. 24). No negligence is claimed after the September 20th breakaway. Negligence claimed includes permitting fire hazardous conditions and practices on Government lands before the fire, and failure to extinguish the spot fires, the fire at the 60-acre stage, and the smoldering fire on the 1600-acre area (R. 26-29). The Forest Service, in common with private operators, had Fire Suppression Plans by which all necessary men and equipment could be mobilized and put into action. Neither the Forest Service nor any private operator maintained or operated a fire-fighting organization as such. Each had some men and equipment available and knew where all necessary additional men and equipment could be immediately obtained (R. 16-18). In this particular area the Government had undertaken to supervise fire fighting activities (R. 6-7). Private companies are authorized to and sometimes do undertake to supervise like activities in private, Federal and state timbered areas. Fire prevention and fighting is but one of many duties of the Forest Service employees (R. 8-10).

The discretionary function exception of 28 U.S.C. §2680(a), Appendix A, *infra*, p. 21, is not involved and has never been urged in this suit as all acts and omissions complained of were at the operational level.

## REASONS FOR GRANTING WRIT

1. *Indian Towing Company, Inc., v. United States*, 350 U.S. 61 (1955), is almost irreconcilable with the "public fireman" doctrine stated in *Dalehite v. United States*, 346 U.S. 15 (1953). *Indian Towing* renounces the "public" or "uniquely governmental" character of an act as being determinative or even material in testing tort liability of the United States. Yet *Dalehite* speaks of the immunity from liability for negligence of public firemen. *Indian Towing* renounces the applicability of municipal corporation law in determining Federal tort liability. We find no case where immunity for acts of firemen is granted except in suits against municipal corporations. On the other hand, municipalities have been held liable in fire cases;<sup>4</sup> the immunities of municipal corporations do not extend to private fire fighting companies and associations;<sup>5</sup> and individuals have been held liable for not properly fighting fires originating on or spreading from their property.<sup>6</sup>

2. The decision of the Ninth Circuit Court of Appeals in this case is in direct conflict with the decisions of this Court and of the Courts of Appeal of other Circuits:

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<sup>4</sup>*City of Denver v. Porter*, 126 Fed. 288 (8th Cir., 1903); *State v. City of Marshfield*, 122 Ore. 323, 259 Pac. 201 (1927); *Osborn v. City of Whittier*, 103 Cal.App.2d 609, 230 P.2d 132 (1951).

<sup>5</sup>*Voltz v. Orange Volunteer Fire Association*, 118 Conn. 307, 172 Atl. 220 (1934); *Doherty v. Oakland Beach Volunteer Fire Co.*, 70 R.I. 446, 40 A.2d 737 (1944).

<sup>6</sup>*Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200 (1917); *Jordan v. Spokane, Portland & Seattle R. Co.*, 109 Wash. 476, 186 Pac. 875 (1920); to the same effect is *McCann v. Chicago, Milwaukee & Puget Sound Railway Company*, 91 Wash. 626, 158 Pac. 243 (1916); *Lehman v. Maryott & Spencer Logging Co.*, 108 Wash. 319, 184 Pac. 323 (1919).

*With respect to the Government's liability as a volunteer.* The Ninth Circuit said, Appendix D, *infra*, p. 59, 225 F.2d 646:

" \* \* \* In our opinion the Dalehite case compels the conclusion that the Government, when intervening in the prevention and control of forest fires, may not be said to assume the common law obligation of a volunteer."

That the Government may be liable for its negligence as a volunteer has been decided by this Court in *Indian Towing Company, Inc., v. United States*, 350 U.S. 61 (1955) and by the Fifth Circuit Court of Appeals in *United States v. Lawter*, 219 F.2d 559 (5th Cir., 1955), which involved rescue at sea by Coast Guard helicopter.

*With respect to liability imposed by state statutes.* The Ninth Circuit says that RCW §§76.04.370 and 76-04.450, Rem. Rev. Stat. §§5807 and 5818, Appendix B, pp. 36-38, " \* \* \* purport to impose liability on a private land owner for failing to take steps to remedy substandard conditions on his property \* \* \* [and] impose liability without fault. \* \* \* " The Court then says that the *Dalehite* case does not waive immunity of the United States in such actions. That decision is in conflict with *United States v. Praylou*, 208 F.2d 291 (4th Cir., 1953), certiorari denied 347 U.S. 934 (1954), which holds the Government liable under the Tort Claims Act by reason of a South Carolina statute imposing absolute liability for injuries caused by aircraft. Furthermore, the Washington Supreme Court construes RCW §76.04.370 as not imposing absolute liability without fault. *State of Washington v. Canyon*

*Lumber Corporation*, 46 Wn.2d 701, 284 P.2d 316 (1955). Regardless of whether a state statute imposes liability which is absolute or not, it is important to settle the question whether state statutes, even criminal statutes, establishing standards of care, failure to conform to which may be negligence for an individual,<sup>7</sup> are not also pertinent in testing for due care by Government employees.

3. The Federal Government owns a substantial majority of the timber and timber lands in the Pacific Northwest and a large part of the remainder of the nation's timber. Many of its holdings are adjacent to or checkerboarded with private timber and timber lands. The Forest Service and private timber operators operate in much the same fashion. Their respective employees have many and similar duties, only one of which is to be alert for fire and to act appropriately when fire occurs. Neither the Forest Service nor any private operator maintains or operates a fire department or fire-fighting organization as such, but both have

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<sup>7</sup> *Discargor v. City of Seattle*, 25 Wn.2d 306, 171 P.2d 205 (1946); *Cook v. Seidenberg*, 36 Wn.2d 256, 217 P.2d 799 (1950); *Erickson v. Kongali*, 40 Wn.2d 79, 240 P.2d 1209 (1952); *Spokane International Railway Co. v. United States*, 72 F.2d 440, 442 (9th Cir., 1934). Civil liability for forest fire damage repeatedly has been predicated on defendant's violation of the minimum standards of conduct prescribed by Washington fire prevention and suppression statutes. *Kuehn v. Dix*, 42 Wash. 532, 85 Pac. 43 (1906); *Jordan v. Welsh*, 61 Wash. 569, 112 Pac. 656 (1911); *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 212 Pac. 174 (1923); *Wood & Iverson, Inc., v. Northwest Lumber Co.*, 138 Wash. 203, 244 Pac. 712 (1926); *Walters v. Mason County Logging Co.*, 139 Wash. 265, 246 Pac. 749 (1926); *Mensik v. Cascade Timber Co.*, 144 Wash. 528, 258 Pac. 323 (1927); *Conrad v. Cascade Timber Co.*, 166 Wash. 369, 7 P.2d 19 (1932). *Michigan Millers Mutual Fire Insurance Company v. Oregon-Washington Railroad and Navigation Company*, 32 Wn.2d 256, 201 P.2d 207 (1948). See also foreign cases digested in 42 A.L.R. 817, 111 A.L.R. 1148-50, 18 A.L.R. 2d 1095-98.

some men and equipment available to fight fires, and know where additional men and equipment can readily and quickly be obtained. Both have fire suppression plans designed to mobilize and put into action all necessary forces to combat the common enemy of fire. Fire burns with the same devastation whether it starts on one side of a section line or the other. Private owners must conform to standards set by State statutes designed to minimize risk of fire and requiring prompt and diligent action to extinguish fire on their lands, whether originating thereon or not. Those statutes are for the common good of private and public timber alike. The common law also imposes standards of care and conduct, failure to conform to which is negligence. If, as the Court of Appeals held, Forest Service employees are public firemen and the Government is immune from liability for their negligence, then the Government, private timber owners, timber industries and the nation as a whole are hopelessly confronted with real and substantial risk of loss of a major, but limited natural resource. It is fair comment that immunity from liability has a deteriorating effect on personal conduct and can lead to lax performance and token observance of practices necessary to the protection and perpetuation of our forests, both public and private. Why, by every legal, political, economic, social and just standard of this country, should a private citizen in the timber industry be liable for his negligence in preventing or fighting fires, and the Government, whose employees have the same opportunities for doing a good, bad or indifferent job as do employees of private owners, be immune from liability? The question

of Government responsibility for maintaining its timber and lands in proper condition and for acting appropriately and with due care in case of fire is extremely important and significant, and the answer to the question is unsettled and confused.

4. The Complaint must be construed in a light most favorable to plaintiff with all doubts resolved in plaintiff's favor and all allegations accepted as true.<sup>8</sup> Rules of Civil Procedure, Rule 8 (f), requires that all pleadings shall be so construed as to do substantial justice. In Washington special responsibilities attach to ownership and control of land. Obviously the extent of the Government's ownership and its right of control of and responsibility for conditions on the land where the fire started, including the right-of-way over which the defective railroad equipment was operated, are matters of primary importance. If one owning or having control of the land has a right and duty to abate fire-hazardous conditions and practices thereon and to fight and pursue fire originating thereon, it is essential to determine the fact of ownership and control. In spite of the above-mentioned rules of construction of the Complaint and in spite of the clear allegation (R. 11) that the Government "owned, had control of and free and unrestricted access to" the land, including the right-of-way thereon, where fire-hazardous conditions and practices existed and where the fire started, the Court of Appeals justifies its decision in part by stating that the Government had only "a right to enter and in-

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<sup>8</sup>*Meredith v. John Deere Plow Co. of Moline*, 89 F.Supp. 787 (S.D. Iowa 1950); affirmed 185 F.2d 481 (8th Cir. 1950); certiorari denied 341 U.S. 936.

spect the right-of-way," Appendix D, *infra*, p. 60; 225 F.2d 646; and, as to other portions of the Government land, that the Washington statutes prescribing standards for conditions of and practices on lands in forest areas are not applicable to the United States because such statutes impose liability without fault, Appendix D, *infra*, pp. 62-63; 225 F.2d 646-648. Proceeding from those erroneous premises and misconstruing the Government's status as well as its responsibilities, the court holds that such negligence as occurred before the fire and such negligence as occurred after the fire up to the time it was contained on August 11 in the 1,600-acre area, is not of a character for which the Government can be held liable. En route to that conclusion, the court acknowledges, Appendix D, *infra*, p. 61; 225 F.2d 647, that there is a division of authority as to whether one failing to conform the use of his land to that of adjoining lands is negligent and then adopts, as controlling, a line of cases in direct conflict with the applicable Washington case of *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031 (1918). In other words the Court of Appeals concludes that so far as the Government is concerned nothing that existed or occurred prior to August 11 is material and cannot be a proximate cause of the damage. That conclusion is possible only through gross misconstruction of the Complaint and erroneous interpretation of the law. According to the Court below, granting that a private party under like circumstances could be held negligent and liable, the acts and omissions, though negligent, having been those of Forest Service employees are superseded as a proximate cause by the intervening act

of those same Forest Service employees putting on their fireman's hats and thereafter proceeding negligently in their immune status as public firemen. Those ratiocinations are not compatible with the rules established by this and other courts that the Complaint be construed in the light most favorable to plaintiff and so as to do substantial justice. We believe it appropriate for this court to exercise its power of supervision.

5. The circumstances under and the extent to which immunity attaches to the acts of federal employees as public firemen is unsettled by *Dalehite v. United States*. For example, when is a federal employee a public fireman? Does it matter that fire prevention and fighting are but two of his many duties? Forest Service employees carry out forestry practices, sell timber, supervise road construction and logging operations, check on hunters, fishermen, campers, and recreationists, give information to the public, watch for fire and fire hazards, and act when fire occurs (R. 8, 9). Is the custodian of a Government building a fireman simply because his duties include good housekeeping and normal attention to fire danger when it occurs? Municipal fire departments devote their full time to the job and they are maintained to protect any and all property and any and all persons within the municipality. On the other hand, duties of Forest Service employees all relate to the administration of Government timber alone and not to the property of others. In administering and protecting Government timber, Forest Service employees best accomplish that purpose by cooperating with other timber operators in rendering and receiving reciprocal aid and by taking action for the mutual and common bene-

fit. It is as conservator of Government property that the Forest Service undertakes to fight fire on lands other than its own. This is contemplated and authorized by 16 U.S.C. §565, Appendix A, *infra*, p. 22. Were it not the Forest Service which undertook to supervise fire fighting in this area, it might have been State forestry employees who did so or it might have been Rayonier Incorporated, the petitioner herein, or some other private timber owner, or some association of private timber owners. Such arrangements are authorized by the above statute and by the Washington statutes, RCW 76.04.410 and 76.04.050, Appendix B, *infra*, pp. 38-39. Private parties sometimes do perform those functions in the states of Washington and Oregon.

Does the immediacy and urgency in one situation and the lack of it in another justify different treatment of fire-fighting cases? In the *Dalehite* case, as in many fire cases, there were acutely dangerous and explosive conditions in the face of a roaring fire. In the case at bar there was no such critical and emergent situation. The fire was contained and controlled within a 1,600-acre area of cutover land where it smoldered for forty days from August 11 to September 20. Within that time the smoldering fire could have been completely extinguished had the Forest Service used sufficient men, equipment and water, all of which were available. Instead, and in spite of the large and valuable timber stands imperiled by the smoldering fire and in spite of dry and fire-hazardous weather conditions, the Forest Service simply put the 1,600-acre area on a patrol basis with but few men to watch it and had no men present

during the night. That was wanton and negligent indifference to a potentially dangerous situation, the consequences of which were foreseeable. It might well be said that the Forest Service employees were not acting as firemen during that forty-day period because they did nothing of consequence to extinguish the fire. Is such conduct the act of a public fireman and is it the type of conduct from which the Government should be immune from liability? Had it been Rayonier or any other private party acting instead of Forest Service employees, as might have been the case, and had it been Government timber which was destroyed by the fire which ensued, would Rayonier have been liable to the Government?

If this court holds that the common law or Washington statutes setting standards for prevention and suppression of fire on lands in forest areas are properly used to determine whether the Forest Service employees were negligent, is the Government immune from liability for such negligence simply because, after the fire breaks out on Government lands, the Forest Service employees don their firemen's hats?

The answers to these and similar questions are important to the public welfare and as guides to conduct of Federal employees. Those questions have not been settled but can be decided in this case and are compelling reasons for this court to review the decision of the Court of Appeals.

**CONCLUSION**

We respectfully urge that this Petition for Certiorari be granted.

We also call attention to the Petition for Certiorari being filed in this court in the companion case, *Arnhold et al. v. United States et al.*, 225 F.2d 649.

Respectfully submitted,

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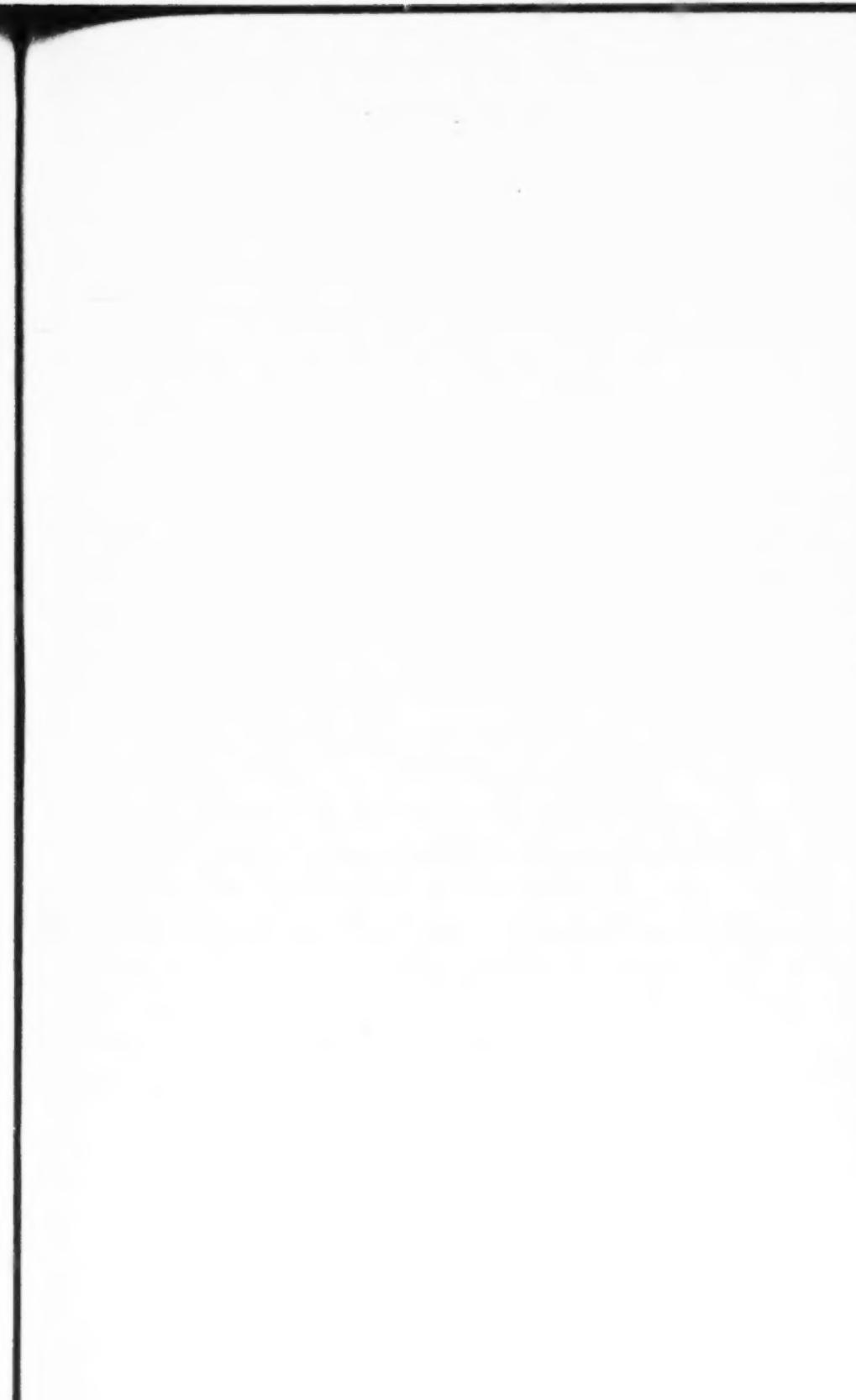
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**APPENDIX A****FEDERAL STATUTES INVOLVED****Federal Tort Claims Act****28 U.S.C. §1346****§1346. *United States as Defendant***

“(a) \* \* \*

“(1) \* \* \*

“(2) \* \* \*

“(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

“(c) \* \* \*

“(d) \* \* \*

“(1) \* \* \*

“(2) \* \* \*

“June 25, 1948, c. 646, 62 Stat. 933, amended Apr. 25, 1949, c. 92, §2(a), 63 Stat. 62; May 24, 1949, c. 139, §80 (a, b), 63 Stat. 101.”

**28 U.S.C. §2671****"§2671. Definitions**

"As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

"'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982, amended May 24, 1949, c. 139, §124, 63 Stat. 106."

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**28 U.S.C. §2674****"§2674. Liability of United States**

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

" \* \* \* June 25, 1948, c. 646, 62 Stat. 983."

**28 U.S.C. §2680****“§2680. *Exceptions***

“The provisions of this chapter and section 1346(b) of this title shall not apply to—

“(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

“(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

“(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

“(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

“(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

“(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

“(g) Repealed. Sept. 26, 1950, c. 1049, §13(5), 64 Stat. 1043.

“(h) Any claim arising out of assault, battery, false

imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

“(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

“(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

“(k) Any claim arising in a foreign country.

“(l) Any claim arising from the activities of the Tennessee Valley Authority.

“(m) Any claim arising from the activities of the Panama Canal Company. As amended Sept. 26, 1950, c. 1049, §§2(a)(2), 13(5), 64 Stat. 1038, 1043.”

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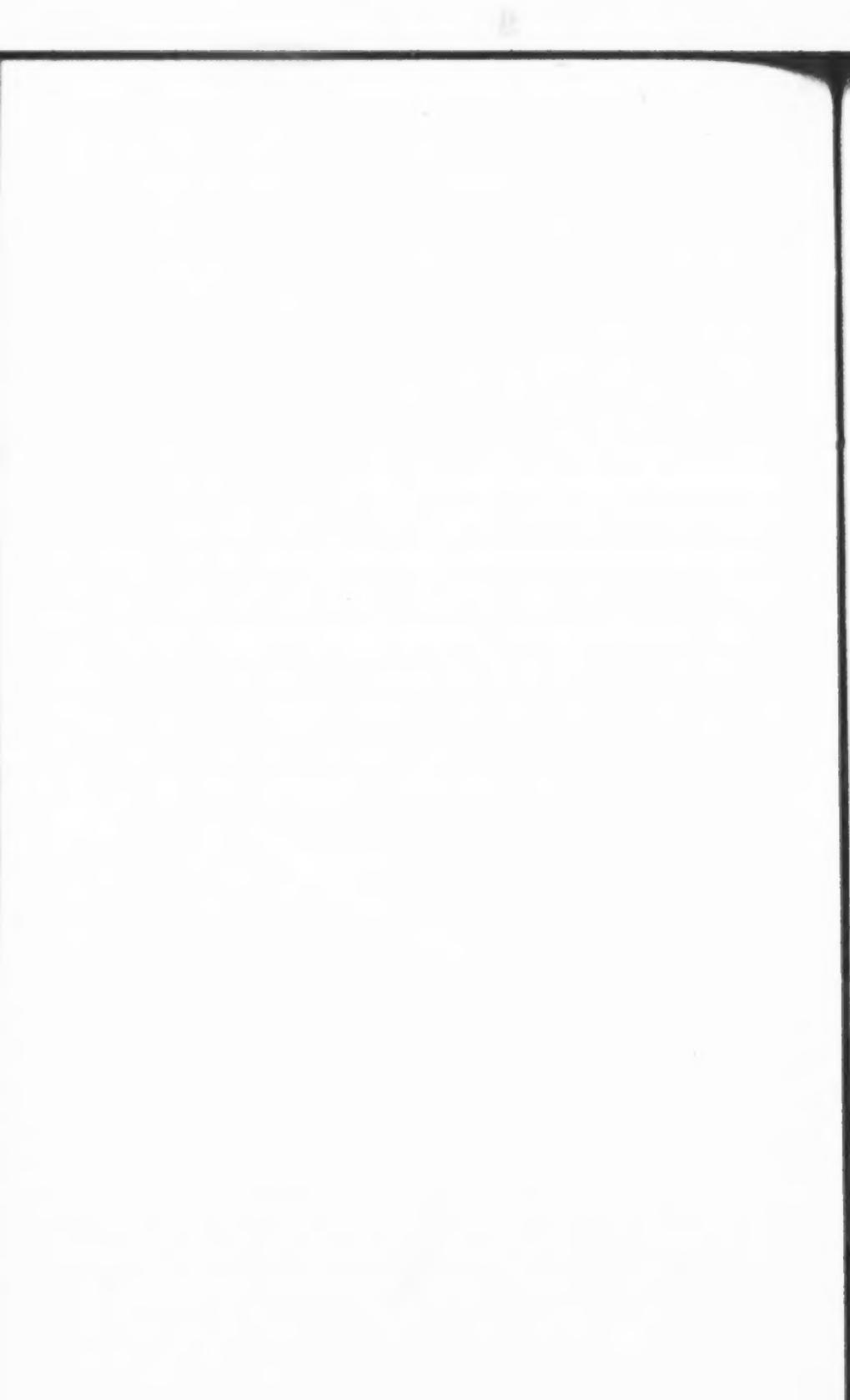
#### **Statute Authorizing Cooperative Forest Protection Contracts**

##### **16 U.S.C. §565**

*“§565. Cooperation by Secretary of Agriculture with State officials in protection of timbered and forest-producing lands from fire; limitation on amount of expenditures by United States”*

“If the Secretary of Agriculture shall find that the system and practice of forest-fire prevention and suppression provided by any State substantially promotes the objects described in section 564 of this title, he is hereby authorized and directed, under such conditions as he may determine to be fair and equitable in each State, to cooperate with appropriate officials of each

State, and through them with private and other agencies therein, in the protection of timbered and forest-producing lands from fire. In no case other than for preliminary investigation shall the amount expended by the Federal Government in any State during any fiscal year, under this section, exceed the amount expended by the State for the same purpose during the same fiscal year, including the expenditures of forest owners or operators which are required by State law or which are made in pursuance of the forest-protection system of the State under State supervision, and the Secretary of Agriculture is authorized to make expenditures on the certificate of the State forester, the State director of extension, or similar State official having charge of the cooperative work for the State, that State and private expenditures as provided for in this section have been made. In the cooperation extended to the several States due consideration shall be given to the protection of watersheds of navigable streams, but such cooperation may, in the discretion of the Secretary of Agriculture, be extended to any timbered or forest-producing lands or watersheds from which water is secured for domestic use or irrigation within the cooperative States. As amended July 25, 1947, c. 327, §1, 61 Stat. 449."



**APPENDIX B****WASHINGTON STATUTES INVOLVED**

**Laws of 1869, p. 154, §601; Rem. Rev. Stat. §950;**  
**RCW 4.08.110:**

"An action at law may be maintained by any county, incorporated town, school district or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character and not otherwise, in any of the following cases:

- (1) Upon a contract made with such public corporation;
- (2) Upon a liability prescribed by law in favor of such public corporation;
- (3) To recover a penalty or forfeiture given to such public corporation;
- (4) To recover damages for an injury to the corporate rights or property of such public corporation."

(This statute subsequently was amended by Laws of 1953, Ch. 118, §1.)

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**Laws of 1869, p. 154, §602; Rem. Rev. Stat. §951;**  
**RCW 4.08.120:**

"An action may be maintained against a county or other of the public corporations mentioned or described in preceding section, either upon a contract made by such county or other public corporation in its corporate character and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation." (This statute subsequently was amended by Laws of 1953, Ch. 118, §2.)

**Laws of 1909, Ch. 249, §271; Rem. Rev. Stat. §2523;  
RCW 76.04.220:**

*“§271. Negligent Fires.*

“Every person who shall wilfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor.”

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**Laws of 1877, p. 300, §3; Rem. Rev. Stat. §5647;  
RCW 4.24.040:**

“If any person shall for any lawful purpose kindle a fire upon his own land he shall do it at such time and in such manner and shall take such care of it to prevent it from spreading and doing damage to other persons property as a prudent and careful man would do, and if he fail so to do he shall be liable in an action on the case to any person suffering damage thereby to the full amount of such damage.”

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**Laws of 1877, p. 300, §5; Rem. Rev. Stat. §5648;  
RCW 4.24.050:**

“Persons engaged in driving lumber upon any waters or streams of this Territory, may kindle fires when necessary for the purposes in which they are engaged, but shall be bound to use the utmost caution to prevent the same from spreading and doing damage; and if they fail so to do, they shall be subject to all liabilities and penalties of this act, in the same manner as if the privilege granted by this action had not been allowed.”

**Laws of 1877, p. 301, §6; Rem. Rev. Stat. §5649;  
RCW 4.24.060:**

"The common law right to an action for damages done by fires, is not taken away or diminished by this act, but it may be pursued, notwithstanding the fines or penalties set forth in the first and second sections of this act; but any person availing himself of the provisions of the third section [shall] be barred of his action at common law for the damages so sued for, and no action shall be brought at common law for kindling fires in the manner described in the fifth section; but if any such fires shall spread and do damage, the person who kindled the same and any person present and concerned in driving such lumber, by whose act or neglect such fire is suffered to spread and do damage shall be liable in an action on the case for the amount of damages thereby sustained."

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**Laws of 1951, Ch. 58, §4; Am. Rem. Supp. 1941,  
§5794 (part); RCW 76.04.250:**

"§4. It shall be unlawful for anyone to operate within one-eighth mile of any forest land between the fifteenth day of April and the fifteenth day of October, which period shall be designated as the closed season unless the designated season is extended by the supervisor due to dangerous fire conditions:

"(1) Any woods operation or mill using spark-emitting or electric engines unless provided with the following fire tools, or the serviceable equivalent thereof, at each landing, and/or yarding tree or mill:

"(a) For operations employing more than five men:

"To be kept in a sealed tool box: Three axes, six shovels and six adze hoes;

"To be kept adjacent to the tool box: Two bucking saws with handles, and one five-gallon pump can filled with water.

"(b) For operations employing five men or less:

"To be kept in a sealed tool box: Two axes, three shovels, and three adze hoes;

"To be kept adjacent to the tool box: One bucking saw with handles, one hundred gallons of water and two buckets.

"(2) Any gasoline, diesel, or electric yarding, skidding, or loading engine unless:

"(a) Equipped with two chemical fire extinguishers of not less than one and one-half quart capacity;

"(b) Exhaust is turned up perpendicular and is clear of all obstructions or is equipped with an adequate spark arrestor.

"(3) Any tractor unless:

"(a) Equipped with one chemical fire extinguisher of not less than one quart capacity;

"(b) It has exhaust turned up perpendicular or is equipped with an adequate spark arrestor.

"(4) Any truck hauling forest products from any forest area unless:

"(a) Equipped with a chemical fire extinguisher of at least one quart capacity;

"(b) Equipped with one axe;

"(c) Equipped with one shovel;

"(d) Exhaust is turned up perpendicular or equipped with adequate spark arrestor or muffler.

"(5) Any portable power saw unless the power saw operators keep in their immediate possession, a chemical fire extinguisher of at least eight ounce capacity, or a serviceable shovel.

"(6) Any gasoline or diesel engine used in a mill or for uses not specifically mentioned above unless:

"(a) Equipped with chemical fire extinguisher of at least one quart capacity;

"(b) Exhaust is pointed up perpendicular and is clear of all obstructions or is equipped with an adequate spark arrester;

"(c) One hundred gallons of water and two buckets."

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**Laws of 1951, Ch. 58, §5; Am. Rem. Supp. 1941,  
§5794 (part); RCW 76.04.260:**

"§5. It shall be unlawful for anyone to operate within one-eighth mile of any forest land between the fifteenth day of April and the fifteenth day of October, which period shall be designated as the closed season unless the designated season is extended by the supervisor due to dangerous fire conditions:

"(1) Any spark-emitting railroad logging locomotive unless:

"(a) Equipped with a safe and suitable device for arresting sparks;

"(b) Equipped with a suitable power pump with a capacity of not less than twenty gallons per minute at pressures not less than forty pounds per square inch;

“(c) Equipped with three hundred feet of hose not less than one inch in diameter equipped with a standard nozzle;

“(d) Equipped with all the complement of hand tools listed under section 1(a) of section 76.04.250, kept in a sealed tool box on such locomotive ready for instant use;

“(e) Equipped with a sprinkler system which can be capable of wetting the tracks and at least two feet on either side of each rail. Such sprinkler system shall be manually controlled from the cab. The water supply tank for such sprinkler shall be capable of carrying an adequate supply of water in direct relation to the mileage of track covered and the available water supply;

“(f) During the closed season it is followed by a speeder or other patrol. Such patrol shall be equipped with two shovels, one axe, and one five-gallon pump can filled with water. When a logging train operates on a common carrier track the patrol will be regulated under laws pertaining to common carrier railroads.

“(2) Any common carrier railroad trains operating through forest lands unless:

“(a) Such trains are followed by a speeder patrol at such times and in such places as the supervisor may designate, each patrol to be equipped with a five gallon fire extinguisher, two shovels and one axe. In case a railroad company fails to provide patrol as required, the supervisor is hereby authorized to employ patrolmen for such purpose and the railroad company concerned shall be liable for the expense of the same to be

collected in a civil suit brought by the state against said railroad company;

“(b) At the request of the supervisor, such common carrier maintain pumping equipment and fire fighting tools specified by the supervisor but not to exceed those required of logging locomotives.

“(3) Any steam logging engine or boiler unless:

“(a) Being equipped with and using a safe and suitable device for arresting sparks;

“(b) Equipped with a suitable power pump with a capacity of not less than twenty gallons per minute at pressures of not less than forty pounds per square inch;

“(c) Equipped with three hundred feet of hose not less than one inch in diameter equipped with a standard nozzle.

“(4) Any railroad locomotive, logging locomotive, logging or other engine or boiler unless equipped with an adequate device to prevent the escape of fire or live coals or other burning substance from all ash pans, and all fire boxes, except when ash pans or fire boxes are being cleaned when not in motion. Any donkey boiler, when equipped to operate without the use of exhaust steam within the stack, and without any artificial means of creating a forced draught, shall not require a spark arrestor.”

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**Laws of 1951, Ch. 58, §6; Am. Rem. Supp. 1941,  
§5794 (part); RCW 76.04.270:**

“§6. Every person violating the provisions of sections 76.04.250 and 76.04.260 shall upon conviction be

punished by a fine of not less than twenty-five dollars nor more than seventy-five dollars and the judgment of the court, in case of conviction, shall prohibit such person from operating a train, railroad locomotive, logging locomotive, or other engine, power equipment or boiler until the requirements of such sections have been complied with."

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**Laws of 1911, Ch. 125, §15; Rem. Rev. Stat. §5795;  
RCW 76.04.280:**

"No one operating a railroad shall permit to be deposited by his, or its, employees, and no one shall deposit during the closed season, fire or live coals upon the right-of-way outside of the yard limits, and within one-quarter of one mile of any forest material, without such deposit of fire or live coals shall be immediately extinguished.

"Any one violating the provisions of this section respecting the deposit of fire or live coals, shall upon conviction pay a fine of not less than twenty-five dollars (\$25.00), nor more than one hundred dollars (\$100.00) or be imprisoned in the county jail not exceeding thirty (30) days.

"Wardens and rangers shall report any lack of sufficient spark-arresters, and any lack of adequate devices for preventing the escape of fire and live coals, as provided in this act, to the forester, and to the prosecuting attorney of their county, and the superior court of that county where suit is first instituted, shall have jurisdiction of the offense."

**Laws of 1923, Ch. 184, §7; Rem. Rev. Stat. §5795-1;  
RCW 76.04.290:**

"Railroad companies and other public carriers, or any person or persons, operating through forested districts, must report forthwith by telephone or telegraph any fires on or adjacent to their right-of-way or route, to the local fire warden or to the office of the state supervisor of forestry."

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**Laws of 1917, Ch. 33, §3; Rem. Rev. Stat. §5796;  
RCW 76.04.310:**

"Everyone clearing right-of-way for railroad, public highway, private road, ditch, dike, pipe or wire line, or for any other transmission, or transportation utility right-of-way, shall pile and burn on such right-of-way all refuse timber, brush and debris cut thereon, as rapidly as the clearing or cutting progresses, or at such other times as the forester, or his authorized representatives may specify, and if during the closed season, in compliance with the law requiring burning permits. No one clearing any land or right-of-way, or in cutting or logging timber for any purpose, shall fell, or permit to be felled, any trees so that they may fall on to land owned by another, without first obtaining permission from such owner in addition to complying with the terms of this section for the disposal of refuse. All the terms of this section and other forest laws of the state shall be observed in all clearings of right-of-way or other land on behalf of the state itself or any county thereof, either directly or by contract; and unless unavoidable emergency prevents, provision shall be made by all officials directing such work for withholding a

sufficient portion of the payment therefor, until the piling and burning is completed, to insure the completion of the piling and burning in compliance with the provisions of this section."

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**Laws of 1923, Ch. 184, §9; Rem. Rev. Stat. §5803;  
RCW 76.04.340:**

"Any person or persons who shall wilfully and deliberately set fire to any forest within the state, or in any place from which fire may be communicated to any such forest, or who shall accidentally set fire to any such forest, or to any place from which fire may be communicated to any such forest, and shall not extinguish the same or use every effort to that end, or who shall build any fire for lawful purposes or otherwise in or near any such forest, and through carelessness or neglect shall permit said fire to extend to and burn through such forest, shall be deemed guilty of a misdemeanor, and on conviction before a court of competent jurisdiction shall be punishable by fine not exceeding one thousand dollars (\$1,000.00) or imprisonment not exceeding one year, or by both such fine and imprisonment."

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**Laws of 1941, Ch. 168, §2; Rem. Supp. 1941, §5804;  
RCW 76.04.350:**

"Every owner of forest land in the State of Washington shall furnish or provide therefor, during the season of the year when there is danger of forest fires, adequate protection against the spread of fire thereon or therefrom which shall meet with the approval of the State Forest Board: *Provided*, That for the purposes

of this section forest lands, lying in counties east of the summit of the Cascade mountains, shall be deemed to be adequately protected where patrol is furnished by the United States forest service of a standard and efficiency and seasonal duration, deemed by the State Forest Board to be sufficient for the proper protection of the forest land of such counties."

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**Laws of 1951, Ch. 58, §9; Am. Rem. Supp. 1945,  
§5806; RCW 76.04.380:**

"Any fire on any forest land burning uncontrolled and without proper action being taken to prevent its spread, notwithstanding the origin of such fire, is a public nuisance by reason of its menace to life and property. The owner, operator, or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands, shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the supervisor, or a warden or ranger; and if such owner, operator, or person in possession refuses, neglects, or fails to do so, the supervisor or any fire warden or forest ranger shall summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from such owner, operator, or person in possession and if the work is performed on the property of the offender, shall also constitute a lien upon the property or chattels under his ownership. Such lien may be filed by the supervisor in the office of the county auditor and foreclosed in the manner provided by law for the fore-

closure of mechanics' liens. The prosecuting attorney shall bring the action to recover the cost or foreclose the lien, upon the request of the supervisor.

"The payment of forest patrol assessment on the land shall be interpreted as a reasonable effort in suppressing and extinguishing any fire on the land except when the fire started on that land as a result of owner/operator negligence and except when extra debris is present as described under laws pertaining to slash responsibility.

"When a fire occurs in a logging operation it shall be fought to the full limit of available employees, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the supervisor or his authorized deputies, sufficient to bring the fire to a patrol basis, and the fire shall not be left without a fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor, or his authorized deputies."

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**Laws of 1951, Ch. 235, §1; Am. Rem. Supp. §5807;  
RCW 76.04.370:**

"Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the per-

son responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien. Nothing in this section shall apply to land for which a certificate of clearance has been issued.

"If the owner or person responsible for such hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic's lien. The summary action may be taken only after twenty days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service or by registered letter addressed to him at his last known place of residence."

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**Laws of 1917, Ch. 105, §5; Rem. Rev. Stat. §5808;  
RCW 76.04.400:**

"When any responsible protective agency or agencies composed of timber owners other than the state shall agree to undertake systematic forest protection in co-operation therewith and such co-operation shall appear more advantageous to the state than the maintenance of the independent system provided elsewhere by law, the state forester may, with the approval of the state board of forest commissioners, designate suitable areas to be official co-operative districts and substitute thereto whenever necessary, in place of the

county wardens elsewhere provided by law, such district wardens, with such district headquarters and duties, as may be agreed upon by him and by the co-operating agencies to render such co-operation most effective. He may also co-operate in the compensation of such wardens, or in the payment of other expenses for the prevention and control of fire in such official fire districts, to such extent as the board of forest commissioners may deem equitable on behalf of the state, and claim for such payments shall be approved and paid in the manner prescribed for claims outside such co-operative districts."

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**Laws of 1949, Ch. 141, §1; Rem. Supp. 1949 §5817-1; RCW 76.04.410:**

"The State Supervisor of Forestry shall, subject to the approval of the Director of the Department of Conservation and Development, have power, subject to the provisions hereof, to enter into contracts and undertakings with private corporations or rural fire protection districts for the protection and development of the forests or any designated forest area within the state."

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**Laws of 1921, Ch. 67, §1; Rem. Rev. Stat. §5818; RCW 76.04.450:**

"All forests and timber upon all lands in the State of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may

be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

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[All of the land described in paragraph XI of the Amended Complaint (R. 11) is located within the area described in the foregoing statute.]

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**Laws of 1911, Ch. 125, §4, part; Rem. Rev. Stat. §5784, part; RCW 76.04.050, part:**

"The supervisor, subject to the approval of the director, may appoint trained forest assistants, possessing technical qualifications, and may employ necessary clerical assistants, and fix the amount of their salaries, which shall be payable monthly.

"He shall, under the supervision of the director, whenever he deems it necessary to the best interests of the state, co-operate in forest surveys, forest studies, forest products studies, forest fire fighting and patrol, and the preparation of plans for the protection, management, replacement of trees, wood lots, and timber tracts, with other states, the United States, the Dominion of Canada, or any province thereof, and with counties, cities, corporations, and individuals within this state. \* \* \* "

\* \* \* "

" \* \* \* "

**APPENDIX C****TRANSCRIPT OF DISTRICT COURT'S ORAL  
REMARKS****Transcript of District Court's Oral Remarks on  
January 18, 1954**

In the above-entitled and numbered cause, given on the 18th day of January, 1954, by the Honorable George H. Boldt, United States District Judge, at Seattle, Washington.

\* \* \* \* \*

(Whereupon, arguments having been had by counsel upon motion of Defendant to dismiss, the following proceedings were had, to-wit:) [3\*]

The Court: This matter presents a question that is certainly far free from doubt, at least in my mind.

My general impressions at this time about it are that in the absence of the Dalehite case I would overrule the motion, but the opinion in the Dalehite case gives me grave doubt as to whether or not this claim is within the Federal Tort Liability Act.

Unfortunately, the language of the majority opinion in the Dalehite case in so far as it bears on our problem, is in itself not free from doubt. The difficulty I have is in determining whether or not Floe was acting as a public fireman. If in all of the matters referred to in the complaint he was acting as a public fireman, according to Dalehite there is no action because Justice

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Reed says in the majority opinion after referring to the Act and a quotation from the Feres case says:

"It—"

namely the Act,

"—did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights."

Query: Under the allegations of this pleading was Floe acting as a public fireman?

It is clear he was acting as a fireman because [4] everything that is alleged in the complaint is to the effect that he was directly engaged in the matter of fighting fire. So he must have been a fireman no matter how poor a fireman or inadequate a fireman or negligent a fireman, he was clearly a fireman.

Now, that leaves the only question; was he a public fireman under this language of the Dalehite case? And I do not intend to engage in a philosophical debate with the Supreme Court. It is my obligation under the oath that I have taken, to apply the law as laid down by the Supreme Court, even though I might have thought otherwise if it had been presented to me as a matter of first impression.

All right. Does that not narrow the question down then to the question of whether or not Floe was a public, acting in a public capacity as a fireman?

You put the question that way and it sounds like a rhetorical question. He certainly wasn't acting on his, in his independent capacity. That is alleged with great particularity in the complaint that he was acting in a public capacity, that he was acting as a representative of the United States Forest Service.

He was a fireman and it is very clear that he was a public fireman, no matter how inadequate or negligent or careless in his job, and Justice Reed says in the majority opinion: [5]

"It—"

namely the Federal Tort Liability Act,

"—did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights."

He goes on to say:

"There is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire."

Now, it is true in that paragraph he was talking about whether or not a cause of action, tort cause of action, of the character referred to existed prior to the adoption of the Act, but still the language that is used is very, very unequivocal and very sweeping. The last sentence of that same paragraph he says:

"To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

Is it an unfair thing to say, to paraphrase that language [6] and say:

"To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure of the Forest Service in fighting a forest fire"?

If you say the one thing, it seems to me you'd surely say the other.

Personally I would prefer to decide the issue after having heard all of the evidence when I might perhaps more adequately judge the nature, extent, character of the capacity of the Forest Service with respect of fighting fire, and yet it seems to me that it would expedite the disposition of this matter if all concerned, both Government and plaintiffs, plaintiff, have a ruling from higher authority than mine on this basic question which, if decided adversely to the plaintiff, disposes of the case. If not so decided, then there would be very extensive proceedings required in order to determine whether in fact Floe was negligent, and if so, whether his negligent acts caused the damage complained of and the nature and extent of the damage.

Gentlemen, I am of the opinion that I am obliged under the Dalehite case, particularly the portions of it that I have referred to and which, incidentally, I have [7] studied and restudied long before today, to sustain the motion to dismiss, basing it entirely on the Dalehite case.

That will be the order of the Court.

**Mr. Marion:** Your Honor, would it be an imposition to ask you, for the purpose of the record, to state your position on the duties of the Government as a land-owner; on whose land the fire originated due to an accumulation of debris; whether or not using a fire department or any other means is controlling of that issue?

**The Court:** My general impression, if you want that; is that what you—

Mr. Marion: I think quite apart from the Dalehite case.

The Court: My general impression is that on that phase of the case I would not sustain this motion to dismiss, myself on that phase of the case. I—if the Government does not have immunity by virtue of its capacity as a public fireman, my opinion is there is a duty, there would be a duty to exercise reasonable care in confining, controlling and extinguishing fire and consequently I would be of the opinion that the action might be maintained, but for the public capacity of the Forest Service in the matter of fighting fire.

Does that give you what you have in mind, or—

Mr. Marion: May I confer with my [8] "better," your Honor?

(Whereupon, Mr. Marion conferred with co-counsel.)

Mr. Marion (Continuing): As I understand your Honor, your Honor holds that in taking part in the forest fire fighting activities Mr. Ranger Floe and his subordinates were operating a public fire department or public firemen?

The Court: No, that isn't what I said. I said they were acting as public firemen.

Mr. Marion: And—

The Court: I don't know whether they had a whole department or a regiment or a squad or single individuals, but I think under the language in the Dalehite case if a Government employee is acting in the capacity of a public fireman, whether he be as an individual or

whether he be as a troop or a squad or a regiment or what, under that decision there is no liability under the Act.

Mr. Marion: And that applies even though the fire originated on lands owned by the Government for pecuniary gain and profit and due to a condition, an accumulation of inflammable material which, under the statutes of the State, are a nuisance?

The Court: You are going beyond what I think, what I understood your question to call for.

Mr. Marion: I am trying, your Honor, to narrow [9] this down so that we may know precisely the question to be decided.

The complaint alleges, of course, a condition which is a nuisance under the laws of the State of Washington in that there were accumulations of debris and so forth. This condition existed on the lands owned by and subject to control of the Government. Now your Honor's ruling is that because the Forest Service employees were what you termed "public firemen"—

The Court: What Justice Reed termed as "public firemen."

Mr. Marion: —these other factors are superseded by and do not influence your decision.

The Court: That is right. If I have been—I have been seriously thinking during the last hour or two of the advisability of taking the matter under advisement and writing a written opinion—a temptation which has occurred to me before and up to now I have successfully resisted. I was getting very close to yielding to

that temptation on this occasion, but finally concluded that I believe that it is to the best interests of all concerned that we speed on with the disposition of it, and my—I can only give you my honest, best judgment about it as I see it, and that is what it is, and I think that if you have a mind to do so, you can review that order very cheaply, inexpensively, and I [10] hope expeditiously, and if I am wrong, be back in a reasonably short time for a trial of the case on its merits.

\* \* \* \* \*

### **TRANSCRIPT OF PROCEEDINGS**

#### **Transcript of District Court's Oral Remarks on February 27, 1955**

**Before: HONORABLE GEORGE H. BOLDT,  
United States District Judge.**

**The Court:** We will proceed to consider the motions in Arnhold and Rayonier vs. United States.

**Mr. Cushman:** Your Honor, I wish permission to continue orally the motion in the Rayonier case against the amended complaint and an amended complaint has also been filed in the Arnhold case in the last day or two and I didn't have time to get out a new motion for judgment on the pleadings against that complaint and— [4]

\* \* \*

**The Court:** I see. Very well, are you ready then to proceed? Do you want to proceed, Mr. Marion?

**Mr. Marion:** Yes, your Honor. I wonder if I might,

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

for the purposes of the record, ask Mr. Cushman to state his motion orally, reading from his prior motion but substituting the word "amended complaint" instead—

The Court: I think that would be a good thing to do. Do that Mr. Cushman. Then we will have—

Mr. Marion: There were two grounds, that is why I wanted to have it clear.

Mr. Cushman: (Reading.)

"The Defendant herein moves the Court as follows:

"1. To dismiss the action because the plaintiff fails to state a claim against the defendant."

The Court: You wanted to read "amended complaint." [6]

Mr. Cushman: I beg pardon. (Reading.)

"The Defendant herein moves the Court as follows:

"1. To dismiss the action because the amended complaint fails to state a claim against the defendant upon which relief can be granted.

"2. To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter in the action."

The Court: Very well. That motion will be allowed and will be—

\* \* \* \* \*

The Court: This is the second very able and thoughtful argument that has been presented to me to sustain the right of action contended for by the plaintiffs in these two cases. I have been very impressed by the argument and I will merely say of the argument this morn-

ing, that the doubt that I expressed at the commencement of my remarks on January 17th [sic] may be somewhat deepened, but not to the point where I feel it requires a change in the ruling. [14]

Extended comment, I think, is not necessary, but perhaps just a word or two to indicate my thought. I am well aware of the important factual differences between the Dalehite case and the present case and between the Eighth Circuit National Manufacturing Company case and in fact all of the other cases that have been cited with the instant case. Nothing has been cited that is closely similar to our situation here in my opinion on the facts. And I will readily agree with Mr. Ferguson and repeat here what I said before, namely, that unfortunately the language of the majority opinion in the Dalehite case in so far as it bears on our problem is in itself not free from doubt, to put it at a minimum. Nevertheless, after giving this matter a very great deal of thought, I am satisfied that the basic philosophy supporting the majority decision in the Dalehite case, and a little more fully expressed in the Eighth Circuit case, requires, if followed, a granting of the motions to dismiss in the present case.

I should say that of course I did not undertake on January 17th at the conclusion of the previous argument to state all of the considerations that I had in mind, and I recognized then and I recognize now that the particular thing that I commented on at that time might have seemed to be a rather shallow analysis of the Dalehite opinion as it related to our present case. I am not going to attempt to elaborate [15] further on it now because in the last analysis I am satisfied the decision

will not be predicated on what I think or say about it if the case is reviewed. I merely meant in all fairness to indicate that I had that thought in mind.

I will say just one further thing. In view of the vastness of the public domain and the tremendous properties owned by the Federal Government, state governments as well, I feel that whether logical or not, there is a distinction, or it will be held that there is a distinction which is perhaps more literally correct statement of it, between the situation of real property owned by the Government and real property owned by an individual.

If we take the literal language of the Federal Tort Claims Act, it is very hard to justify on any logical basis that there is any distinction. I grant you that, but I am satisfied that public consideration, the serious implications that would flow from a failure to make such a distinction will dictate that such a distinction be drawn. If so, of course there, as far as I know, never has been any right of action against the state authorized by Washington law or any other state law as far as I know for negligence in the keeping of publicly-owned land, and I have an idea that that is the analogy that will be laid as a test for this situation rather than the strict analogy of a purely private individual owning forest lands in the State of [16] Washington.

But whether or no that ultimately be the case, in my own mind I feel obliged to grant the motions on the strength of the philosophy of the Dalehite decision, and that is what the ruling of the Court will be.

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The Court: Yes. While you are reviewing, may I ask

one other thing, you might want to talk about that as well. In a case of this magnitude and importance, not only to the litigants, but generally to law, I would have much preferred taking the case under advisement and taking time to write and polish up an opinion, which perhaps is what I should have done anyway, but in order to expedite this disposition of the case, I ruled on January 17th [sic] orally and here again I have done likewise. Yet it seems to me desirable, that for whatever it is worth, my views ought to be made a part of any record that may be taken on appeal. I presume you have in mind doing that?

Mr. Marion: Yes.

(Whereupon, counsel conferred.) [23]

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Mr. Marion: One other matter. In the [24] Rayonier case—I think it would also be true in the Arnhold case—the defendant's motion to dismiss was based on two grounds: one, no claim was stated, the other, the Court lacks jurisdiction. Do I assume that your Honor denies the motion on the ground that the Court lacks jurisdiction?

The Court: That is right.

Mr. Marion: That is the basis on which we have prepared this order.

\* \* \*

(Whereupon, discussion was had concerning the entering of the order.)

Mr. Marion: For the purpose of the record, I also wish to state that Rayonier Inc. does not wish to amend further and will stand on its amended complaint.

The Court: Very well. The order appears to me to [25] be in proper form. Do you have any objection to the form of the order now, Mr. Cushman?

Mr. Cushman: Well, your Honor, I don't believe that the first ground is well taken. I believe the Court should deny this motion because the Court lacks jurisdiction since the matter does not come within the Tort Claims Act, and that is it.

The Court: The point hasn't been presented to me at all in the argument.

Mr. Cushman: Pardon?

The Court: I didn't understand that the point had been presented to me in the argument at all. Perhaps inferentially it was, but I didn't so understand it.

Mr. Cushman: Perhaps I am confused, your Honor.

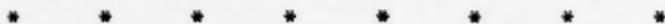
The Court: Maybe it is another way of saying the same thing.

Mr. Cushman: Our original motion had two grounds.

The Court: Oh, yes, of course, but I understood that the ground—that you were receding from the first ground but that the ground that was being urged was the old traditional "not sufficient facts to constitute a ground for relief."

Mr. Marion: Your Honor, if you have no jurisdiction I don't believe your Honor could rule on the other ground.

The Court: I wouldn't think so too. That is [26] my impression. I think the order is in proper form. I am going to enter the order as now presented. It is signed, the Clerk is directed to enter it.



**APPENDIX D****OPINION OF COURT OF APPEALS  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

RAYONIER INCORPORATED, a Corporation,      *Appellant,*  
    vs.

UNITED STATES OF AMERICA,      *Appellee.*  
    No. 14,329, September 1, 1955

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION**

Before: BONE, ORR and HASTIE, Circuit Judges.  
ORR, Circuit Judge.

Appellant filed an original and amended complaint in the trial court seeking to recover damages against the United States. The amended complaint, says appellant, alleges a cause of action within the area in which the United States has waived its sovereign immunity from suit under the Federal Tort Claims Act, 28 U.S.C.A. §§1346, 2671-2680. The damages claimed are for property losses.

On motion the trial court dismissed the action on the ground that the complaint failed to state a claim against the United States on which relief can be granted.

We summarize the pertinent allegations of the amended complaint. Appellee, hereafter Government, is and was at all material times the owner of vast timber forests situate on the Olympic Peninsula of the State of Washington. These forests are administered and pa-

trolled by the Forest Service, a branch of the Department of Agriculture. The Port Angeles Western Railroad is the owner of various railroads rights of way across the public lands, which rights of way are subject to a right of "control" and "free access" held by the United States. Appellant, hereafter Rayonier, is a Delaware corporation with extensive timberland holdings in the State of Washington, principally on the Olympic Peninsula.

On August 6, 1951, sparks emitted by a passing locomotive ignited a fire along the railroad's right of way. The Chief United States Forest Ranger was immediately notified and assumed control of the fire fighting activities, which control he continued to exercise during the entire period of fire fighting. The fire spread first to sixty acres of public land, where it was confined until August 7th. It then flared up and spread to a 1600-acre tract, not alleged to be government owned. By August 11th the fire was "contained and controlled." It smoldered in the 1600-acre tract until September 20th. On September 20th it flared up again, escaped from the 1600-acre area and caused the alleged injuries to Rayonier's land.

It is further alleged that the Chief Forest Ranger committed numerous wrongful acts and omissions in the course of fighting the fire on the 1600-acre tract. The amended complaint avers that he failed to employ sufficient men and equipment although there was an ample supply available, and that the proper utilization of such available man power and material would have resulted in the extinguishment of the fire.

In addition, Rayonier seeks to predicate liability on the Government's alleged negligent failure to maintain the roadbed of the railroad in safe condition, its failure to maintain adjoining public lands in safe condition, its failure to perform the fire fighting duties required of a landowner, and its failure to fight the fire according to the duty of care which the law requires of a volunteer.

The crux of our inquiry is whether the allegations of the amended complaint brings the case within the ambit of the Tort Claims Act. The trial court in deciding that they do not relied upon the holding in the case of *Dalehite v. United States*, (1953) 346 U.S. 15. While much is alleged as to the origin of the fire, negligence of the United States in failing to keep the railroad right of way clear of inflammable matter as well as negligence in failing to control the early spread of the fire, we read the amended complaint in its entirety as picturing a situation wherein the operation occurring after the fire had spread to the 1600-acre plot is determinative of the liability of the Government, if any. The fire, after reaching the 1600-acre tract, smouldered for more than a month, flared up again and reached appellant's property. In our opinion it was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the act or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated.<sup>1</sup> Here the complaint al-

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<sup>1</sup>"In general, when a third person becomes aware of the danger, and is in a position to deal with it, the defendant will be free to assume that he would act reasonably." *Prosser, Torts*, 1941, 367; *Cook v. Seidenverg*, 1950, 36 Wash.2d 256, 217 P.2d 799; see, *Crowley v. City of Raymond*, 1939, 198 Wash. 432, 88 P.2d 858; *Lehman v. Maryott &*

leges that the fire was "contained and controlled." It is alleged that men, equipment and water, for more than a month, were available to extinguish it. Failure to extinguish the fire is alleged to be due to the negligent refusal to employ the available resources and to use ordinary judgment. Paragraph XXXII of the complaint states that:

"The fire and all burning material within the 1600-acre area and especially in the westerly portion of said area and in the landing described in paragraph XXI above could have been completely extinguished between the dates of August 11 and September 19, 1951 and the fire which broke loose on September 20, 1951, could have been avoided, by the use and employment of more men, tools, equipment, water and supplies, and such men, tools, equipment, water and supplies were available and could have been so used and employed by the District Ranger Floe and his subordinates."

On these facts, liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract.

Having reached the conclusion that failure to completely extinguish the fire after it had been contained within the 1600-acre tract for approximately six weeks was the sole proximate cause of the injuries to appellant's property, we now give attention to the allegation that the failure to completely extinguish and contain the fire within said tract was due to the negligence of the fire fighters. These men were Forest Service em-

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Spencer Logging Company, 1919, 108 Wash. 319, 184 P. 323. Cf. Pittsburgh Reduction Co. v. Horton, 1908, 87 Ark. 576, 113 S.W. 647, and Ryan v. New York Central R.R. Co., 1866, 35 N.Y. 210, 91 Am. Dec. 49.

ployees and functioning as public firemen. Under the circumstances was their employment such as to render the Government liable in the same manner and to the same extent as a private individual would be and thus within the provision of the Tort Claims Act, 28 U.S.C.A. §2674?

In the Dalehite case, *supra*, the Supreme Court construed the act with reference to an analogous fact situation. There suit was brought to recover damages for negligence on the part of government officials in the manufacture and shipment of ammonium nitrate fertilizer. The fertilizer exploded while stored aboard ship in the harbor of Texas City, Texas. The Coast Guard attempted to put out the fire but failed. It was charged with taking inadequate measures to control the blaze. The Supreme Court denied relief. We set forth a portion of the opinion of the Supreme Court:

"As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

" . . . the liability assumed by the Government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.' *Feres v. United States*, 340 U.S. 135, 142.

"It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question

is determined by what was said in the Feres case. See 28 U.S.C. §§1346 and 2674. The Act, as was there stated, limited United States liability to 'the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C. §2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than Feres. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

The control of conflagrations on forest lands is as much a public function as the fighting of shipboard fires or of pestilence in time of epidemics. We conclude that the Forest Rangers in fighting the fire acted in the capacity of public firemen. The Forest Service engages in extensive fire protection programs. It assists state foresters by subsidies and consultation; it conducts nationwide fire prevention campaigns; it carries on extensive research into techniques and devices for fire prevention and suppression. The service has entered into

several agreements similar to the one alleged to be in force here whereby it assumes the state function of suppressing fires on all lands within a particular area, whether publicly or privately owned. We see no distinction between non-liability of the United States for negligence of the Coast Guard in fighting fires and analogous negligent conduct by the Forest Service. In our opinion the Dalehite case compels the conclusion that the Government, when intervening in the prevention and control of forest fires, may not be said to assume the common law obligation of a volunteer.

We do not regard the fact that the United States had by prior agreement with the State of Washington undertaken to protect against forest fires as creating a distinction, rendering the Dalehite case inapplicable. In entering into the agreement, even if it be considered a binding contract (the complaint falls short of alleging a binding contract, and there is no allegation of consideration for the Government's promise) the Government did no more than undertake to perform services in a public capacity. Cf, *National Manufacturing Co. v. United States*, 8 Cir. 1954, 210 F.2d 263.

Having concluded that the alleged neglect of the firemen to use reasonable methods to control the fire within the 1600-acre tract was the proximate cause of the spread of the fire to appellant's lands, and that inasmuch as the fire fighters were acting as public servants to the extent that their activities were without the area of the waiver of sovereign immunity contained in the Tort Claims Act, we might well conclude this opinion. But Rayonier makes other claims which we proceed to discuss.

The principal allegations in this respect relate to the failure of the Government to keep the railroad right of way (the starting point of the fire) and adjoining public lands free and clear of inflammable material and, once the fire started, failure to take proper precautions to extinguish it before it reached the 1600-acre tract.

It is alleged that liability may be predicated on the Government's failure to maintain the Railroad's right of way in satisfactory condition. The right of way held by the Railroad was at least equivalent to an easement.<sup>2</sup> Ordinarily the servient estate is under no duty to make repairs, the duty resting on the dominant tenant who alone is liable for injury to third parties. The allegation in the complaint that the Government had a right to enter and inspect the right of way does not alter this. Reservation of such a right is not equivalent to an assumption of the obligation to repair and maintain the right of way. The servient tenant does not undertake to clean up such rubble as the Railroad may accumulate. Cases dealing with the law of landlord and tenant cited by the appellant are not persuasive, for example, see *Appel v. Muller*, 262 N.Y. 278, 186 N.E. 785.

The Government, under the allegations of the complaint, was an adjoining landowner to whose property

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<sup>2</sup>Great Northern Ry. Co. v. United States, 1941, 315 U.S. 262; Himonas v. Denver & R. G. W. R. Co., 10 Cir., 1949, 179 F.2d 171. See also, Jones, Easements, 1898, §208; Tiffany, Real Property, 3rd ed. 1939, §772, and cases cited.

<sup>3</sup>Reed v. Alleghany Co., 1938, 330 Pa. 300, 199 A. 187. See, also, Herzog v. Grosso, 1953, 41 Cal.2d 219, 259 P.2d 429; Strauss v. Thompson, 175 Kan. 98, 259 P.2d 145; 2 Thompson, Real Property, 1939, §680; 3 Elliott, Railroads, 1921, §1750; Jones, Easements, 1898, §§821, 831.

fire, ignited on the property of a third party, has spread. At common law an adjoining landowner is not liable to third parties for failure to anticipate negligent acts of his neighbor and maintain and utilize his lands accordingly. Rayonier has cited no cases where such a liability was imposed. Cases such as *Prinee v. Chehalis Savings & Loan Association*, 1936, 186 Wash. 372, 58 P.2d 290, affirmed 186 Wash. 377, 61 P.2d 1374, cited by Rayonier deal with the liability of a landowner on whose property fire breaks out because of the existence of fire hazards and are distinguishable.

There is a division of authority on the question of whether failure to maintain safe conditions on adjoining land may constitute contributory negligence in a suit by such landowner to recover against the party responsible for the fire. In *Leroy Fibre Co. v. Chicago M. & St. P. Ry. Co.*, 1914, 232 U.S. 340, the United States Supreme Court held as a matter of law that plaintiff's stacking of inflammable flax near a railroad right of way did not constitute contributory negligence. This holding has been cited with approval and applied in recent cases.<sup>4</sup> Other recent cases apply a different rule.<sup>5</sup>

In *Riley v. Standard Oil Co. of Indiana*, 1934, 214 Wis. 15, 252 N.W. 183, liability was imposed upon a person who neither started the fire nor owned the land on which it occurred. The court there accepted the

<sup>4</sup>See *Atlas Assurance Co., Ltd. v. State*, 102 Cal.App.2d 789, 229 P.2d 13; and *Kleinclaes v. Marin Realty Co.*, 94 Cal.App.2d 733, 211 P.2d 582.

<sup>5</sup>See *Stephens v. Mutual Lumber Co.*, 1918, 103 Wash. 1, 173 P. 1031, where failure on the part of the adjoining landowner to remove his property after notice of the outbreak of fire was held to bar his recovery, and *Nashville C. & St. L. R. v. Nants*, 1933, 167 Tenn. 1, 65 S.W.2d 189.

jury's determination that the defendant, who had stored grease and oil in a warehouse next to a wide field of uncut grass despite knowledge that for over a year a fire had smouldered in a peat bog a short distance away, was liable to a plaintiff whose house was set afire by burning particles from the defendant's warehouse. The defendant was held negligent for failure to cut the grass. That case is an extreme one. The point in question was assumed by the court without reference to authorities or arguments. The law has been traditionally reluctant to visit extensive liabilities on those directly responsible for the occurrence of fire. See *Ryan v. N.Y. Central R.R. Co.*, 1866, 35 N.Y. 210. Cases dealing with contributory negligence are in conflict. In our opinion a failure to maintain safe conditions on property adjoining a railroad right of way does not render one liable for damages because the fire spread across his land to other land.

Appellant cites R.C.W. §§76.04.370 and 76.04.450, and §§5807 and 5818 Rem. Rev. Stats.\* These provisions purport to impose liability on a private landowner for

\*Rem. Rev. Stats. § 5807, and § 5818:

"§ 5807. Cut-over lands as public nuisance—Abatement—Cost as lien—Notice before suit—Excepted lands. Any land in the State of Washington covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, and/or right of way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner or owners thereof and the person, firm or corporation responsible for its existence are required to abate such hazard. Nothing in this section shall apply to lands for which a certificate of clearance, under section 2 of chapter 207, Laws of 1929 (section 5792-1 of Remington's Revised Statutes; section 2569-1 Pierce's Code), has been issued.

"If the owner or person, firm or corporation responsible for the existence of any such hazard shall refuse, neglect or fail to abate such hazard, the state supervisor of forestry may summarily cause it to be abated and

failing to take steps to remedy substandard conditions on his property but have no application here. Secs. 5807 and 5818 impose liability without fault. No defense based on the reasonableness of the conduct proscribed is provided. The Dalehite case, 346 U.S. at pages 44, 45, holds that the Federal Tort Claims Act does not waive the immunity of the United States in such actions.<sup>7</sup>

In the instant case the amended complaint predicates

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the cost thereof and of any patrol or fire fighting made necessary by such hazard may be recovered from said person, firm or corporation responsible therefor or from the owner of the land on which such hazard existed by an action for debt and said costs shall also be a lien upon said land and may be enforced in the same manner, with the same effect and by the same agencies as the lien provided for in section 3 of chapter 105, Laws of 1917 (section 5806 of Remington's Revised Statutes; section 2581 of Pierce's Code): Provided, That said summary action hereinbefore referred to may be taken only after twenty (20) days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service on said owner or by registered letter addressed to said owner at his last known place of residence."

"§ 5818. Forests and timber protected. All forests and timber upon all lands in the state of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary lines of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

"... there is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected both in the District Court's finding that the FGAN constituted a nuisance, and in the contention of petitioners here. We agree with the six judges of the Court of Appeals, 197 F.2d 771, 776, 781, 786, that the Act does not extend to such situations, though, of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property or of engaging in an 'extra-hazardous' activity. *United States v. Hull*, 1 Cir., 195 F.2d 64, 67."

liability on the failure by the Government to take adequate steps to control the fire when it had spread to public lands and before it reached the 1600-acre tract. We fail to find a case wherein a landowner was held liable to third parties for failure to fight a fire spreading across his land from the land of another. Cases cited by appellant deal with the duties of a landowner on whose property the fire broke out. To hold an intermediate landowner liable for damage to property caused by fire passing over his land, to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule.

Sec. 5806 Rem. Rev. Stat. of Washington,<sup>8</sup> R.C.W. 76.04.380, does not change the common law so as to im-

<sup>8</sup>§ 5806, Rem. Rev. Stat. of Washington, R.C.W. 76.04.380:

“§ 5806. Uncontrolled fires as nuisances—Abatement and lien for cost. Any fire on any forest land in the State of Washington burning uncontrolled and without proper precaution being taken to prevent its spread is hereby declared a public nuisance by reason of its menace to life or property. Any person, firm or corporation responsible for either the starting or the existence of such fire is hereby required to control or extinguish it immediately, without awaiting instruction from a forest officer, and if said responsible person, firm or corporation shall refuse, neglect or fail to do so, the supervisor of forestry or any fire warden or forest ranger acting with his authority, may summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from said responsible person, firm or corporation by action for debt and, if the work is performed on the property of the offender, shall also constitute a lien upon said property. Such lien may be filed by the supervisor of forestry in the office of the county auditor and foreclosed in the manner provided by law for the foreclosure of liens for labor and material. It shall be the duty of the prosecuting attorney for the county to bring such action for debt, or to foreclose such lien, upon the request of the supervisor of forestry.

“When a fire occurs in a logging operation, such fire shall be fought to the full limit of available employees, as may be necessary, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the state forester, or his authorized deputies, sufficient to bring such fire to a patrol basis, and such fire shall not be left without such fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor of forestry, or his authorized deputies.”

pose such a liability. The duty it imposes becomes operative upon the receipt of a written demand. The penalty exacted is reimbursement to the state of expenses incurred by it in fire fighting activities. A method of securing reimbursement is provided. No liability is placed on the landowner, with or without written notice, to third parties where public fire fighters take inadequate measures in their attempt to subdue the blaze.

The judgment of dismissal is affirmed.

(Endorsed:) Opinion. Filed Sept. 1, 1955.

Paul P. O'Brien, Clerk.

**APPENDIX E**

**THE SEPTEMBER 1, 1955, JUDGMENT  
UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT**

RAYONIER INCORPORATED, a corporation,  
*Appellant,* } No. 14329  
vs.  
UNITED STATES OF AMERICA,      *Appellee.* }

**JUDGMENT**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION**

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and Entered : September 1, 1955

PAUL P. O'BRIEN, Clerk.